

12-1998

Shaping the Future of the Profession

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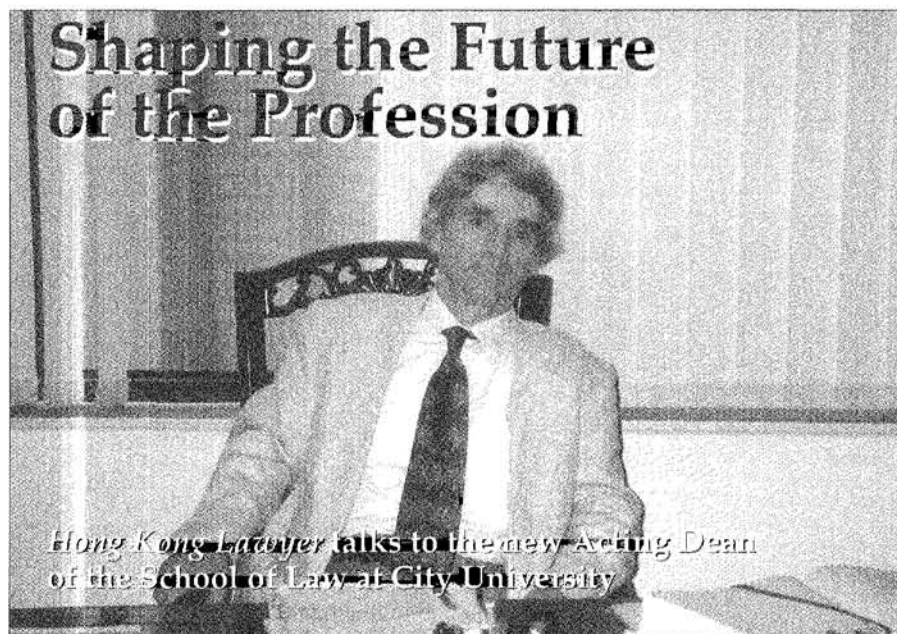


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Citation

SMITH, David N.. Shaping the Future of the Profession. (1998). *Hong Kong Lawyer*. 56-57. Research Collection School Of Law.
Available at: https://ink.library.smu.edu.sg/sol_research/431

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David N Smith brings to his new job as the Acting Dean of the School of Law at City University a resume that is as long as it is varied. Currently on leave from his position as Vice-Dean at Harvard Law School, he has been involved in legal education and administration for the past 25 years. During that time he has also served as a legal advisor to a whole host of countries including China, Indonesia, Laos, Malaysia, Nepal, Sri Lanka, Thailand and Vietnam on matters involving legal education, law reform, conflict resolution, foreign investment policy and natural resource and environmental policy. He is proud to count among his former students at Harvard Professor Albert Chen, Dean of Law at University of Hong Kong (whom he refers to as a brilliant scholar), and Ma Ying Jeou who is running for election to the office of Mayor of Taipei in Taiwan.

Legal Education

Smith's appointment as Acting Dean coincides with what he believes is a period of great change confronting the legal community in Hong Kong. As the world itself has become more

complex, so too has the role of lawyers. As a consequence, Dean Smith believes that 'lawyers and legal scholars need to feel comfortable working in other subject areas such as economics, technology, public administration, or politics.' He points as an example to the issue of natural resource use in Asia. 'You cannot understand issues related to natural resources in Asia without understanding the economics of the industry, the politics of the country within which you are operating, the mentality of the administrators and the sociology of the local communities.'

'Hong Kong law school graduates are going to be increasingly challenged by law graduates who have had very rich educational backgrounds'

The importance for lawyers of interdisciplinary training and research

is one of the reasons that Dean Smith believes that Hong Kong needs to take another look at its system of legal education. 'In today's very complex world, lawyers probably need more background in the liberal arts and sciences than has been the case in the past.' Moreover, he argues that there are a number of major growth areas in the law where Hong Kong lawyers should be taking the lead. 'In areas such as environmental law, law and technology, law and media, intellectual property — these are some of the cutting edge issues of the future, areas in which the Hong Kong legal profession should be taking the lead and not yielding these subject areas to foreign lawyers. But in order to deal with these subject areas more effectively, lawyers do need more exposure to science and technology, economics and politics.'

One of the ways that Hong Kong might accomplish this objective, Smith suggests, is to add at least an additional year to the three year legal training program during which time students can focus on non-law disciplines and language studies. This, he believes, would provide a firmer foundation for legal studies. 'In the US and Canada, for example, lawyers have a total of seven years of university education where the first four years are liberal arts and sciences. In countries in Latin America and Europe, legal education often extends to five years, and during those years students often take so-called out of discipline courses in history and science and so forth.' Smith believes that such an educational background is important because, as he argues, 'law cannot be viewed just as a technical, black letter discipline.'

Smith cites another reason why a change in educational policy would be desirable. 'Hong Kong law school graduates are going to be increasingly challenged by law graduates who have had very rich educational

backgrounds. With the globalisation of the legal profession and with Hong Kong and other countries opening their doors to more and more foreign lawyers, they are going to face increasing competition.' While he is quick to point out that he has been extremely impressed with the skill, expertise and professionalism of both local lawyers and the judiciary, he nonetheless is of the opinion that 'the universities, and perhaps the Hong Kong Government as well, need to rethink what legal education should be.'

'There is a big difference between law on the books and law in action'

Hong Kong and The Basic Law

With the enactment of the Basic Law, Hong Kong has seen the dawn of a new constitutionally based legal system. It is in this area that Dean Smith sees the universities, and the law school at City University in particular, playing an important role. 'Both with regard to constitutionalism in Hong Kong, and constitutionalism in China, we should be undertaking some comparative studies to show how various "constitutional issues" are dealt with in other countries. We need to show the different models that have existed in relationships between courts and administrative agencies; the courts and the legislature; the legislature and the administrative agencies. In that way, lawyers, judges, and legislatures, when confronting new problems — and in a way shaping constitutionalism — can have in their minds models that have existed in other places. The Basic Law, as with most constitutions, does not necessarily solve practical, day-to-day problems. Lawyers and judges and legislatures have to solve these

problems. So there needs to be more education about how constitutions have worked elsewhere and to see how competing interests are balanced in other societies.'

Law Reform

Dean Smith is also a strong advocate of the need for more research that looks at the law reform process that is currently taking place in the Mainland. 'I would like to see research into how effective law reform has been and what needs to be done to make it more effective. There is a big difference between law on the books and law in action. One of the things that has not been as healthy as it should be in the world is that there is a lot of exporting of laws from industrialised countries into developing and newly industrialised countries, without as much attention as there should be to the social and political context in which those laws are going to operate. My feeling is that China may in fact be doing better in some ways in this regard than other countries. But even so, it's one thing to adopt a law. It's another thing to have it effectively administered by government officials, and another to have it effectively administered by courts.'

'foreign law and economic advisors often have not recognised that law reform is a very difficult and a very long-term process'

Smith believes that one of the sources of the current economic crisis in Asia and Russia is the failure of law reform. 'Banking laws have not been adequately shaped. Governments have not adopted systems that can control

corruption. And the courts often have been unreliable and ineffective.' But the problem does not lay entirely with the local governments and courts. As he points out, 'foreign law and economic advisors often have not recognised that law reform is a very difficult and a very long-term process. Foreign law advisors have often been inadequately attuned to the infrastructure that you need to make a law or a legal system work.' He hopes that through research into the law reform process, the law school will be able to make a significant contribution to the developing legal system in the Mainland.

City University

Despite his fairly recent arrival, Smith nonetheless possesses a very clear vision of what he hopes to achieve during his tenure as Dean of the School of Law at City University. 'My primary goal for City University is that we strive to be the best law school that we can possibly be.' The way in which this can be achieved he believes is through a strong commitment to both teaching and research. 'I want to encourage the faculty to think great thoughts ... I want us to think about the teaching process here and whether we are encouraging as much analytical and critical thinking as we should. Are we encouraging students to question law, and to think not only about what the law is but also what it should be?'

He believes that as an institution, the School of Law has much to contribute to the development of law both in Hong Kong and in the Mainland. As a consequence, research into the right areas must be encouraged so that both Hong Kong and the Mainland can benefit. For what is obvious above all else is that 'we have a strong obligation to society and to the profession to produce the best possible research, and to give the best possible legal education and the strongest sense of professional responsibility to our students.' ■

塑造法律專業的未來

本刊訪問了剛就任為城市大學法律學院署理院長的史達偉

史達偉本為哈佛大學法律學院的副院長，他現正放假，到了香港擔任城市大學法律學院署理院長一職。他在過去二十五年來致力於法律教育及行政工作，而這段時期對他來說是多姿多采的。他亦曾擔任中國、印尼、老撾、馬來西亞、尼泊爾、斯里蘭卡、泰國及越南等國家的法律顧問，對這些國家的法律教育、法律改革、糾紛調解、對外投資政策、天然資源與環境政策等問題提供意見。史達偉在哈佛任教時，最令他感到驕傲的學生，包括了他形容為優秀學者的香港大學法律學院院長陳弘毅，以及台北市市長的候選人之一的馬英九。

法律教育

史達偉認為，他被委任為署理院長的時期，香港的法律社會正面臨重大改變。律師的角色正隨著世界本身變得複雜。故此，史達偉相信「律師及法律學者須令自己適應在經濟、科技、公共行政、政治等其他範疇內工作。」他以使用亞洲天然資源這問題為例子。他說：「我們若不了解有關行業及工業的經濟運作、有關國家的政治體制、施政者的思維及當地的社會學，便不可能明白有關亞洲天然資源的問題。」

史達偉相信，律師接受不同學科的訓練的重要性，正是香港需要重新檢討其法律教育制度的原因之一。他指出：「在現今的複雜世界中，律師們所要具備的文科及理科基礎，應較從前的律師深厚。」此外，史達偉認為現時法律面對著不少重大改變，當中香港的律師應該起帶頭作用：「譬如說，環境法、法律與科技、法律與傳媒、知識產權法等，這些都是與未來息息相關的問題，香港法律界在這些問題上應該起帶領作用而不應讓海外律師負責。但律師們若要有效地處理這些問題，他們應對自然與科技、經濟及政治等有更深的認識。」

史達偉認為，香港若要達致這個目標，其中一個方法是把現時法律訓練課程的年期由三年增加至少一年，於該年內學生將專注學習非法律科目及語文技巧。史達偉

相信這做法將替學生將來學習法律築起更穩固的基礎：「舉例說，在美國及加拿大的律師，都須接受合共七年的大學教育，當中首四年是文理各科的教育。在拉丁美洲及歐洲國家，法律教育課程一般為期達五年，期間學生經常須修讀各種所謂『非法律』科目，例如歷史及理科等等。」史達偉相信這些學術背景是重要的，理由是：「我們不能單單視法律為純技術性的狹窄學科。」

史達偉亦指出另一個原因，解釋為何改變教育政策是可取的：「香港的法律系畢業生，將受到越來越多具備豐富教育背景的法律畢業生的挑戰。隨著法律專業的全球化以及香港及其他國家容許海外律師前來執業，香港的律師將要面臨愈趨激烈的競爭。」史達偉強調，他相當欣賞本地律師們及司法界的專業知識、技能和水平，但他覺得「各所大學，也許甚至是香港政府本身，都應重新反省法律教育的意義為何。」

香港與《基本法》

《基本法》的制訂，標誌著一個在新憲制基礎上建立的法律制度的誕生。史達偉認為，在這範疇內，各所大學——特別是城市大學法律學院——正扮演著重要的角色。他說：「不論是有關香港或中國的憲法主義，我們都應從事比較性的研究，以考察其他國家如何處理各種『憲制問題』，以及行政、立法、司法三者間的相互關係中曾出現的不同模式。這樣，律師、法官及立法機關在面對新問題——及在某程度上塑造憲法主義——的時候，便可參考曾在其他地方出現的模式。正如大部分憲法一樣，《基本法》並不一定能解決日常生活上的實際問題，解決這些問題的責任，落在律師、法官及立法機關手上。因此，我們需要教導學生其他地方的憲法如何運作，以及其他社會如何令各種對抗性的利益達致平衡。」

法律改革

史達偉亦主張對現時正在中國大陸進行的法律改革過程作出研究。他指出：「我希

望探討法律改革的有效程度以及應該做些什麼工作令它更有效。書本上的法律與實際運作的法律，有很大的分別。世界上出現了一個不健康的現象，就是有很多法律從工業發達的國家『出口』到發展中國家及新興的工業化國家，但與此同時有關人士並未有顧及到那些法律是在甚麼社會及政治環境下運作。我感覺中國在這方面可能較其他國家做得好。但縱是如此，我認為採納某種法律是一回事，確保政府官員有效地執行法律是另一回事，而確保法院有效地執行法律又是另一回事。」

史達偉相信，目前亞洲區及俄羅斯經濟危機的成因之一，是欠缺法律改革。他認為「銀行法的塑造未臻完善。政府亦未有採納有效控制貪污的機制。而法院則往往既不可靠，亦缺乏效力。」但其實這並非只是當地政府及法院的問題。正如史達偉指出：「很多時候，海外法律及經濟顧問未有認知到法律改革的過程是相當艱巨和費時的。那些顧問往往未能完全適應令法律或法制有效運作所需的基礎架構。」他希望法律學院透過進行法律改革研究能對中國大陸法制的發展作出重大貢獻。

城市大學

雖然史達偉最近才到達香港，但他對於任職城市大學法律學院署理院長期間的工作，已立下了清晰的目標及理想。他說：「對於城市大學法律學院來說，我的首個目標是儘量令它成為最好的法律學院。」他相信，達致這目標的方法，是對教學及學術研究作出切實承諾：「我希望鼓勵學院作出崇高的思想……我希望我們本身反省這裡的教學過程，以及我們有否履行鼓勵分析性及批判性思想的責任。我們有否鼓勵學生對法律提出疑問呢？有否鼓勵他們反思不單法律是怎樣，還有法律應該是怎樣呢？」

史達偉相信，城市大學法律學院作為一所專上學院，可以對香港及中國大陸兩地法律的發展作出多方面的貢獻。故此學院應鼓勵路向正確的研究，這對香港及中國大陸兩地均會有益處。史達偉這樣總結了他和法律學院的最大承諾：「我們當竭盡所能，從事最高水平的研究，並為學生提供最好的法律教育及使他們培養最強烈的專業責任感。這是我們對法律界以至整個社會的義務。」 **END**